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No. 99-1908

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IN THE

Supreme Court of the United States

NOV 13 2000

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, MANUFACTURERS ALLIANCE, AND U.S. REPS. ROBERT ADERHOLT, SPENCER BACHUS, SONNY CALLAHAN, TERRY EVERETT, AND BOB RILEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: November 13, 2000

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QUESTION PRESENTED

Whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal administrative regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

Fairly encompassed within that question is the following subsidiary question:

Whether the U.S. Departments of Justice and Transportation exceeded the authority granted to them under Section 602 of the Civil Rights Act of 1964, when they adopted regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law firm with supporters in all 50 states, including Alabama.[1] WLF devotes a significant portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this and other federal courts in an effort to prevent unwarranted judicial expansion of federal civil rights laws. In particular, WLF has opposed attempts to incorporate "disparate impact" principles into cases decided under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* *See, e.g., Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, *cert. dismissed*, 524 U.S. 974 (1998); *Powell v. Ridge*, 187 F.3d 387 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999). WLF also filed a brief in support of the certiorari petition in this case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Manufacturers Alliance is a non-profit research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers with annual sales revenues in the $30 million

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

to $100 million range to very large, highly diversified manufacturers with annual sales revenues exceeding $1 billion. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members' worldwide competitiveness.

Reps. Robert B. Aderholt, Spencer Bachus, Sonny Callahan, Terry Everett, and Bob Riley are members of the U.S. House of Representatives from Alabama. They are participating in this case in order to ensure that laws adopted by Congress are interpreted in the manner intended by Congress, and not re-written in an overly-expansive manner by federal administrative agencies.

Amici are troubled by the broad scope of the decision below; they are concerned that it could result in judicial challenge to a broad range of facially neutral programs and policies administered by State actors and by private entities that receive federal funding. Indeed, numerous such challenges are pending.

Amici agree with Petitioners that the appeals court erred when it held that Congress intended to create a private right of action under regulations implementing Title VI of the Civil Rights Act of 1964 on behalf of individuals allegedly injured by policies that have a disparate impact on the basis of race, color, or national origin. No such right of action is set forth in the statute, and -- applying traditional rules of statutory construction -- there is no basis for inferring congressional intent to create such a right of action.

Amici write separately in order to emphasize an additional ground for concluding that Congress did not intend to

create a private right of action to enforce Title VI disparate impact regulations. In adopting Title VI (which proscribes intentional discrimination only), Congress never intended to permit federal agencies to promulgate Title VI regulations incorporating a disparate impact standard. Because the regulations purporting to adopt such a standard were not authorized by Congress, it could not have intended to create a private right of action on behalf of those alleging injury as a result of violation of those regulations.

Amici are filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Alabama Department of Public Safety (the "Department") is charged with licensing motor vehicle drivers within Alabama. In 1991, the Department adopted a policy requiring all portions of the driver's license examination process to be administered in English.

Respondent Martha Sandoval filed suit against the policy in 1996, alleging that Alabama's English-only policy had a disparate impact on the foreign-born, who (Ms. Sandoval alleged) are more likely than U.S.-born residents to be unable to comprehend English. Ms. Sandoval alleged that the policy violated federal regulations designed to implement the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, *et seq*.[2]

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[2] Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

(continued...)

Following a February 1998 trial, the district court granted the Department's motion for judgment as a matter of law on Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Ms. Sandoval has not appealed from that ruling. On June 3, 1998, the district court issued its opinion rendering judgment for Ms. Sandoval, based on a disparate impact standard. Pet. App. 58a-254a. The court found: (1) the federal regulations adopting a disparate impact standard were valid (*id.* at 74a n.11); (2) the Department was a recipient of federal funds within the meaning of Title VI (*id.* at 76a-82a); (3) Congress impliedly created a direct cause of action on behalf of those discriminated against in violation of the Title VI regulations (*id.* at 82a-117a); (4) Ms. Sandoval had standing (*id.* at 117a-125a); (5) the Eleventh Amendment did not bar Ms. Sandoval's claims for injunctive relief (*id.* at 125a-149a); (6) Alabama's English-only policy had a disparate impact on those born outside the United States (*id.* at 149a-205a); and (7) Alabama did not meet its burden of demonstrating that the English-only

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[2](...continued)
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies that provide financial assistance to issue "rules, regulations, or orders of general applicability" in order to "effectuate the provisions of section 601." The Title VI regulations invoked by Ms. Sandoval in support of her claim are 49 C.F.R. § 21.5(b)(2) (Department of Transportation) and 28 C.F.R. § 42.104(b)(2) (Department of Justice), which require recipients of federal funds to not "directly, or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." *See* Petition Appendix ("Pet. App.") 5a n2.

policy had a "substantial legitimate justification" (*id.* at 205a-246a). The court enjoined enforcement of the English-only policy and ordered the parties to meet in an effort to agree on a new policy. *Id.* at 252a-254a.

The Eleventh Circuit affirmed. *Id.* at 1a-57a. The appeals court upheld the validity of the Department of Transportation and Department of Justice Title VI regulations imposing a disparate impact standard, stating that this Court held in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), that federal agencies "have the authority to promulgate regulations under Section 602 that prohibit federal funding recipients from taking any action that *results* in a disparate impact or produces discriminatory *effects* on the basis of race, color, or national origin." Pet. App. 35a-36a (emphasis in original).[3]

The appeals court also found that Congress impliedly created a private right of action to enforce the disparate

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[3] The appeals court stated that the Department "concede[d] that these agency implementing regulations are valid exercises of agency authority under Section 2000d-1." *Id.* at 5a n.2. That statement is incorrect; the Department made no such concession. The Department's Eleventh Circuit brief merely recited what the various *Guardians* opinions said regarding the validity of the disparate impact regulations (Brief at 28), and then noted that later Supreme Court case law "rejected an attempt by private plaintiffs to assert a disparate impact claim under Title VI regulations." 11th Circuit Brief at 29 (citing *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992)). Furthermore, the appeals court recognized later in its opinion that the Department was, indeed, challenging the regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians*. . ." Pet App. 47a n.24.

impact regulations. *Id.* at 34a-48a.[4] The court based that finding primarily on its reading of this Court's opinions in *Guardians* and *Alexander v. Choate*, 469 U.S. 287 (1985).

Finally, the appeals court affirmed the trial court findings that the English-only rule had a disparate impact on foreign-borns and that the Department had failed to provide adequate justification for the rule. Pet. App. 48a-56a. Accordingly, the appeals court affirmed the trial court's grant of injunctive relief.

The Department's certiorari petition presented a single issue for review: whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a State's violation of federal Title VI regulations that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. Fairly encompassed within that issue is the validity of those regulations -- because there can be no basis for inferring a congressional intent to create a private right of action to enforce disparate impact regulations if Congress never intended to permit such regulations.

SUMMARY OF ARGUMENT

The Question Presented in this case asks whether Congress intended to create a private right of action on behalf of individuals claiming to have been injured by a

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[4] The appeals court did not consider whether 42 U.S.C. § 1983 created an *express* right of action to enforce the Title VI disparate impact regulations against State actors. The court stated that Ms. Sandoval had chosen not to assert a right of action under § 1983 but rather to rely solely "on Section 602 directly." *Id.* at 45a n.21.

federal fund recipient's violation of regulations issued pursuant to Title VI that purport to incorporate a disparate impact standard into Title VI's anti-discrimination provisions. *Amici* fully support the Department's position that the answer is no -- Congress did not intend to create such a private right of action. But the principal reason why the answer most assuredly is "no" is that Congress never intended to grant federal agencies the authority to adopt such regulations in the first instance. It is uncontested that Congress intended that Title VI *not* apply in any instance in which there is no evidence of intentional discrimination. Given that intent, the disparate impact regulations must be invalid, because it cannot be the case that such regulations "effectuate" the provisions of Title VI (as is required of any regulation issued pursuant to § 602 of Title VI, 42 U.S.C. § 2000d-1). Accordingly, there is no private right of action to enforce the Title VI disparate impact regulations because Congress cannot, of course, have intended to create a private right of action to enforce invalid regulations.

The validity of the disparate impact regulations is properly before the Court because that issue is "fairly embraced" within the Question Presented. Moreover, their validity was addressed by both the district court and the court of appeals.

The Eleventh Circuit and numerous other lower federal courts have wrongly interpreted this Court's decisions in *Guardians* and *Alexander* as holding that agency regulations under Title VI that incorporate a disparate impact standard are valid -- when, in fact, this Court has never decided the question. Most recently, in *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992), the Court indicated that agency regulations under Title VI did *not* extend beyond the

protection provided by the Fourteenth Amendment, but the Eleventh Circuit ignored *Fordice*'s admonition under the mistaken belief that the Court had settled the issue in *Guardians* and *Alexander*.

Both the language and legislative history of Title VI indicate that Congress did not authorize federal agencies to adopt disparate impact regulations. Moreover, a decision upholding the disparate impact regulations could disrupt a wide range of commonly accepted government activities. It could even undermine the essential purpose of Title VI -- eliminating *intentional* discrimination on the basis of race, color, or national origin -- by inducing federal fund recipients surreptitiously to engage in intentional discrimination in order to avoid the types of racial or ethnic imbalance that can give rise to disparate impact lawsuits.

I. THE ISSUE OF WHETHER FEDERAL AGENCIES EXCEEDED THEIR AUTHORITY BY ADOPTING REGULATIONS THAT PURPORT TO INCORPORATE A DISPARATE IMPACT STANDARD IS PROPERLY BEFORE THE COURT

The Court long ago established that Congress impliedly intended to create a right of action by individuals claiming to have been injured by a federal fund recipient's violation of the substantive provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. *See, e.g., Cannon v. University of Chicago,* 441 U.S. 677 (1979). Thus, if regulations adopted by federal agencies did nothing more than flesh out the contours of those substantive provisions, the issue whether Congress intended to create a private right of action for violation of those regulations would never arise. Any suit to enforce such regulations would, in

essence, be a suit to enforce the substantive provisions of Title VI, and the propriety of such suits is well established.

The private right of action question arises here solely because federal agencies have adopted Title VI regulations whose substantive provisions are materially different from those of Title VI itself. The Court has repeatedly stated that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *See, e.g., United States v. Fordice,* 505 U.S. 717, 732 n.7 (1992). On the other hand, the Title VI regulations that Ms. Sandoval seeks to enforce purport to bar not only those actions that *intentionally* discriminate against protected groups, but also those actions "which *have the effect* of subjecting [individuals] to discrimination on the basis of their race, color, or national origin." 49 C.F.R. § 21.5(b)(2), 28 C.F.R. § 42.104(b)(2) (emphasis added). The district court rejected Ms. Sandoval's intentional discrimination claims. Pet. App. 64a. Thus, Ms. Sandoval cannot prevail in this case unless she can establish that Congress intended to permit private citizens to bring suit to enforce Title VI regulations that adopt substantive provisions materially different from the substantive provisions of Title VI itself.

The Court granted a certiorari petition whose Question Presented asked whether Congress impliedly intended to create such a cause of action. Answering that question will require a careful examination of congressional intent. The issue of congressional intent quite clearly encompasses the question whether Congress authorized federal agencies to adopt Title VI regulations that purport to reach conduct that, although not intentionally discriminatory, nonetheless has a disparate impact on the basis of race, color, or national

origin. If the evidence demonstrates that Congress did not authorize the adoption of such regulations, then that evidence would also demonstrate that Congress did not impliedly intend to permit private rights of actions to enforce such invalid regulations. Accordingly, *amici* respectfully suggest that the Court begin its analysis by examining the validity of the regulations that Ms. Sandoval seeks to enforce. The validity of the regulations is a "subsidiary question fairly included" within the question presented by Petitioners. SUP. CT. R. 14.1(a).

In her brief in opposition to the certiorari petition, Ms. Sandoval insisted that the question of the validity of the regulations is not before the Court. Opp. Br. 13-14 n.7. She argued that the Question Presented "does not seek review of the validity of the discriminatory effects regulations, only their private enforcement." *Id.*

For the reasons outlined above, Ms. Sandoval's argument is mistaken. Moreover, in case there was any doubt on this score, the Department laid that doubt to rest in its reply brief. The Department stated explicitly: "The question whether the regulations are valid is fairly embraced in the question whether private litigants may enforce them." Reply Br. 6 n.3.[5]

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[5] The Department reiterated that position in a supplemental brief filed in support of the certiorari petition. The supplemental brief took issue with the Executive Branch's enforcement of Title VI regulations, as exemplified by a new U.S. Department of Justice Policy Guidance on discrimination against non-English speakers. The brief stated:

> "DOJ states that its Policy Guidance "does not create new obligations, but rather, clarifies existing Title VI responsibilities." (continued...)

Alternatively, *amici* submit that the validity of the disparate impact regulations should be considered because it is a question of law that is a "predicate to an intelligent resolution" of the question on which the Court granted certiorari. *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980). It makes little sense to devote the Court's limited resources to resolution of an issue -- the existence of an implied right of action -- that will be of no relevance if, as *amici* contend, the underlying disparate impact regulations are invalid. As the Court has recognized, it "retains the independent power to identify and apply the proper construction of governing law," regardless whether or to what extent any party is pressing for that construction. *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993).

Ms. Sandoval also asserts that the validity of the regulations is not properly before the Court because that issue was not raised or considered in the Eleventh Circuit. Opp. Br. 13 n.7. That assertion is incorrect. As noted *supra* at 5 n.3, the Department's Eleventh Circuit brief never conceded the validity of the disparate impact regulations; indeed, the brief cited this Court's *Fordice* decision in support of the proposition that those regulations were subject to question. 11th Cir. Br. at 29. More importantly, the Eleventh Circuit understood the Department

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[5](...continued)
Supp. App. at 14a, 15a-16a. Alexander and the Department disagree because the Policy Guidance directs agencies to impose an affirmative obligation of accommodation that it greater than the congressionally mandated Title VI obligation to refrain from intentional discrimination.

Supp. Br. 6 n.3.

to be challenging the validity of the disparate impact regulations, stating, "Appellants argue that the Supreme Court in *United States v. Fordice* overruled *Guardians* . . ." Pet. App. 47a n.24. The Eleventh Circuit proceeded to consider (and ultimately reject) that argument. *Id.* at 35a-36a, 48a n.24. Similarly, the district court considered and ultimately upheld the validity of the disparate impact regulations. Pet. App. 74a, 90a, 98a. Because the lower courts fully considered and rejected arguments that the disparate impact regulations were invalid because Congress had not authorized adoption of such regulations, the Court should not hesitate to consider those arguments as well.

Amici recognize that the Department has placed limited emphasis on its claim that the disparate impact regulations are invalid. It has chosen instead to devote most of its brief to demonstrating that even if Congress authorized federal agencies to adopt disparate impact Title VI regulations, it did not intend to permit private enforcement of those regulations. But because the validity of the regulations was raised and considered by the courts below and because that issue is "fairly embraced" within the Question Presented upon which the Court granted certiorari, the issue of the regulations' validity is properly before the Court.

II. THE DECISION BELOW WAS BASED ON THE ERRONEOUS ASSUMPTION THAT *GUARDIANS* DETERMINED THAT CONGRESS AUTHORIZED FEDERAL AGENCIES TO INCORPORATE A DISPARATE IMPACT STANDARD INTO TITLE VI REGULATIONS

The Department is subject to Title VI by virtue of its receipt of funding from the U.S. Department of Transportation (DOT). Consideration of whether DOT could validly incorporate a disparate impact standard into its Title VI regulations must begin with the Constitution and Title VI itself. The Court has held that the Equal Protection Clause prohibits only instances of intentional discrimination and does not address conduct that has a disparate impact on protected groups but is not intentionally discriminatory. *Washington v. Davis,* 426 U.S. 229 (1976). The Court has also held that Title VI extends no farther than the Equal Protection Clause and thus that a Title VI claim cannot be established based solely on disparate impact evidence. *Fordice,* 505 U.S. at 732 n.7; *Regents v. Bakke,* 438 U.S. 281, 284-87 (1978) (Powell, J., concurring in the judgment); *id.* at 328 (Brennan, White, Marshall, and Blackmun, JJ, concurring in the judgment in part and dissenting in part). Indeed, the Eleventh Circuit acknowledged that Ms. Sandoval's failure to demonstrate discriminatory intent in this case precluded a cause of action under either Title VI or the Equal Protection Clause. Pet. App. 34a.

Having properly acknowledged the limited scope of protection provided by the Constitution and Title VI, the Eleventh Circuit then embarked on a misguided analytical detour, based on a misreading of this Court's decisions. The appeals court stated that this Court's decisions in *Guardians* and *Alexander* held that a federal agency's issuance of disparate impact regulations is a valid exercise of its authority under Section 602, 42 U.S.C. § 2000d-1. Pet. App. 35a-37a. However, properly read, neither of those decisions encompasses such a broad and erroneous holding.

Guardians involved an allegation that a last-hired/ first-fired policy for lay-offs of police officers had a disparate impact on black and Hispanic police officers because officers were hired in order of their examination scores, and members of those racial groups on average scored lower on the examinations. The Second Circuit denied the plaintiffs' damages claim under Title VI on the ground that a Title VI cause of action requires proof of discriminatory intent.

A fractured Supreme Court affirmed, but without producing a majority opinion. Seven Justices agreed that no Title VI cause of action could be established in the absence of evidence of intentional discrimination. *Guardians,* 463 U.S. at 610 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). However, the Court was far less united in its views regarding the Title VI disparate impact regulations. Four Justices who voted to affirm the Second Circuit stated that administrative agencies could not validly incorporate a disparate impact standard into Title VI regulations once it had been determined that Title VI itself did not incorporate such a standard. *Id.* at 611 (Powell, J., concurring in the judgment, joined by Burger, C.J., and Rehnquist, J.); *id.* at 613 (O'Connor, J., concurring in the judgment). The four dissenting Justices stated that the disparate impact regulations were valid. *Id.* at 623 (Marshall, J., dissenting); *id.* at 645 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Justice White stated that the Second Circuit should be affirmed on the ground that monetary relief is unavailable in an action brought pursuant to the Title VI regulations where there is no allegation of intentional discrimination. *Id.* at 593-98 (White, J., concurring in the judgment). Justice White also stated in *dictum* that the Title VI disparate impact regulations were valid, but that *dictum* played no part in the disposition of the case. *Id.* at 589-93.

Because five Justices in *Guardians* (the four dissenters plus Justice White) stated that the Title VI disparate impact regulations were valid, the Eleventh Circuit concluded that *Guardians* "held" that those regulations were valid. But as the Court emphasized once again just this past term, "This is simply not the way that reasoned constitutional adjudication proceeds." *United States v. Morrison,* 120 S. Ct. 1740, 1757 (2000). One cannot glean the Court's "holding" in a case by adding together the views of concurring and dissenting Justices, even when the sum is five or greater. Rather, "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Nichols v. United States*, 511 U.S. 738, 745 (1994) (quoting from *Marks v. United States,* 430 U.S. 188, 193 (1977)). Thus, in *Morrison* the Court rejected the argument that a view joined in by three concurring Justices and three dissenting Justices constituted a "holding" of the Court in *United States v. Guest,* 383 U.S. 745 (1966). *Morrison,* 120 S. Ct. at 1757.[6]

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[6] If Supreme Court "holdings" really were defined so expansively, creative litigants would have little difficulty in uncovering a "holding" to support virtually any proposition of law. For example, by combining the views of six justices expressed in two separate cases, one could plausibly argue that the Court has already "held" that Congress did not intend to permit private enforcement of the Title VI disparate impact regulations. The four justices in *Guardians* who declared the disparate impact

(continued...)

Accordingly, the only "holding" in *Guardians* is the narrowest grounds agreed to among the five Justices who voted to affirm the Second Circuit's decision -- namely, that without evidence of discriminatory intent, there can be no cause of action for damages based on violation of Title VI or its implementing regulations. The Eleventh Circuit's finding that *Guardians* had upheld the Title VI disparate impact regulations was based on its erroneous belief that a "holding" can be discerned by adding together the views of concurring and dissenting Justices.

The appeals court also claimed that the Court upheld the Title VI disparate impact regulations in *Alexander*. Pet. App. 36a, 38a. That claim is a misreading of *Alexander*, which had nothing to do with Title VI but rather involved the Rehabilitation Act of 1973 (the "Act"), a law loosely patterned after Title VI. The plaintiffs in that case were Medicaid recipients who sought declaratory and injunctive relief from a State's reduction in the number of inpatient hospital days that the State's Medicaid program would pay

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[6](...continued)
regulations invalid (Justices O'Connor, Rehnquist, and Powell, and Chief Justice Burger) clearly did not endorse a private right of action to enforce those invalid regulations. *Guardians*, 463 U.S. at 610 (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment). Two of the dissenters in *Guardians*, Justices White and Blackmun, had previously dissented in *Cannon* because they did not believe that Congress had intended to create a private right of action either under Title VI or under Title IX of the Education Amendments of 1972. *Cannon*, 441 U.S. at 714-730 (White, J., dissenting). Thus, applying the Eleventh Circuit's fractured logic, one could add the votes of Justices White and Blackmun from *Cannon* to the votes of the four above-referenced justices in *Guardians* to arrive at the conclusion that six justices "held" that there is no implied private right of action under the Title VI disparate impact regulations.

on behalf of the recipients. *Alexander*, 469 U.S. at 289. The plaintiffs alleged that the State's reduction had a disparate impact on the handicapped and thus violated the Act and its implementing regulations. The unanimous and limited holding of the Court was that the plaintiffs' allegations were not cognizable under the Rehabilitation Act or its implementing regulations. *Id.* at 309. The Court's opinion includes a brief discussion of *Guardians* (*id.* at 292-94) and Title VI, but that discussion is clearly *dicta* given that *Alexander* did not involve a Title VI claim and given that the holding in the case was that the plaintiffs did *not* state a claim under the Act or its implementing regulations.

Any suggestion that the Court has already upheld the Title VI disparate impact regulations was laid to rest by *Fordice*, a suit (brought by private plaintiffs and the United States) alleging that Mississippi had not done enough to eradicate the lingering effects of past segregation in its higher education system. In response to the private plaintiffs' claims that Title VI and its implementing regulations required Mississippi to do more to eradicate those effects, the Court stated:

> Private petitioners reiterate in this Court their assertion that the state system also violates Title VI, *citing a regulation* to that statute which requires States to "take affirmative action to overcome the effects of prior discrimination." *Our cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment.* We thus treat the issues in these cases as they are implicated under the Constitution.

Fordice, 505 U.S. at 732 n.7 (emphasis added) (citations omitted).

The appeals court noted this passage but rejected the Department's argument that the passage called into doubt the validity of the Title VI regulations, stating, "Nor are we persuaded that the Supreme Court would have overruled *Guardians* without *any* discussion of its precedent and in so oblique a manner as suggested by Appellants." Pet. App. 48a n.24. But the appeals court's rationale for brushing off *Fordice* proceeds from a faulty premise: *Guardians* did *not* hold that the regulations were valid, and thus there would have been no need for *Fordice* to "overrule" *Guardians* in order to question their validity.

In sum, the Court has never directly ruled on the validity of Title VI disparate impact regulations. A ruling striking down the regulations would not entail overruling any of the Court's precedents.

III. BECAUSE IT DID NOT ADOPT A DISPARATE IMPACT STANDARD FOR TITLE VI, CONGRESS CANNOT BE DEEMED TO HAVE AUTHORIZED AGENCIES TO ADOPT THAT STANDARD IN THEIR IMPLEMENTING REGULATIONS

Both Ms. Sandoval and the Eleventh Circuit concede that a Title VI cause of action requires proof of discriminatory intent. Pet. App. 34a. Section 602, 42 U.S.C. § 2000d-1, authorizes federal agencies disbursing federal funds to issue "rules, regulations, or orders of general applicability" in order "to effectuate the [anti-discrimination] provisions" of § 601. Given that § 601 does

not incorporate a disparate impact standard, it is difficult to discern how regulations incorporating such a standard could be said to "effectuate" the provisions of § 601.

As Justice O'Connor explained in *Guardians*:

> Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose. . . . Although the Court has stated that an agency's legislative regulations will be upheld if they are "reasonably related" to the purposes of the enabling statute, . . . we would expand considerably the discretion and power of agencies were we to interpret "reasonably related" to permit agencies to proscribe conduct that Congress did not intend to prohibit. "Reasonably related to" simply cannot mean "inconsistent with."

Guardians, 463 U.S. at 613-15 (O'Connor, J., concurring in the judgment) (citation omitted).

This is not a case where room for agency discretion in defining the scope of prohibited conduct was necessary because it was impractical for Congress to enact specific limitations. Within constitutional limits, Congress could have determined that the dangers of discrimination warranted extending Title VI protections beyond instances of intentional discrimination. That it did not do so must be regarded as a deliberate policy choice, and not as a deferral to administrative agencies to make the decision instead. The difference between prohibiting discriminatory intent and disparate impact represents precisely the type of broad public policy decision that rests in the hands of our elected legislatures, and not administrative agencies. Under these circumstances, DOT's decision to incorporate a disparate

impact standard into its Title VI regulations is not entitled to deference. *See Guardians*, 463 U.S. at 611 n.5 (Powell, J., concurring in the judgment) ("I do not question the view that the Court should sustain a reasonable administrative interpretation even if we would have reached a different result had the question initially arisen in a judicial proceeding. . . . But I know of no precedent whatever for asserting that this deference to administrative interpretation is proper *after* this Court already has issued a definitive -- and contrary -- construction of its own.") (citation omitted).

As noted above, *Fordice* called into serious question the validity of the Title VI disparate impact regulations. *Fordice*, 505 U.S. at 732 n.7. In an effort to distinguish *Fordice*, Ms. Sandoval asserts that *Fordice* is irrelevant to disparate impact issues because the plaintiffs there based their case on intentional discrimination claims alone, not claims of disparate impact. Opp. Br. 18. Ms. Sandoval is mistaken as to the basis of the claims in that case.

Fordice was a suit brought by private plaintiffs and the United States against Mississippi under the Equal Protection Clause, Title VI, and the Title VI disparate impact regulations; the plaintiffs claimed that Mississippi had failed to dismantle its dual system of higher education. By the time the case reached the Court in 1992, intentional racial discrimination within the Mississippi higher education system had long since ended. Thus, *Fordice* can properly be characterized as a disparate impact case; the principal issue before the Court was whether Mississippi should be forced to abandon educational practices that, although they were not intentionally discriminatory, tended to perpetuate the racial identification of public universities. The Court held that Mississippi had a remedial duty under the

Constitution to eliminate any continuing effects of its past segregation, and that that duty included an obligation to eliminate "policies and practices" lacking sound educational justification if they were "traceable to" its prior segregated higher education system and if they "continue[d] to have segregative effects." *Fordice*, 505 U.S. at [2736]. But the Court rejected the private plaintiffs' claim that Mississippi had violated Title VI regulations by failing to "take affirmative action to overcome the effects of prior discrimination." *Id.* at 732 n.7. The Court explained that neither Title VI nor its implementing regulations extended any further than the reach of the Equal Protection Clause and thus that Mississippi would be required to adopt only those remedies demanded by the Constitution. *Id.* By rejecting claims that the Title VI regulations could require remedies not demanded by the Constitution, *Fordice* implicitly rejected any Title VI regulation that purports to adopt a disparate impact standard.

In sum, there is no plausible interpretation of Title VI that would support a conclusion that Congress intended § 601 *not* to bar practices having a disparate impact on the basis of race, color, or national origin, but at the same time intended § 602 to permit federal agencies to adopt regulations that *did* bar such practices.[7]

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[7] The district court also asserted that, quite apart from Ms. Sandoval's right to sue Petitioners under the Title VI disparate impact regulations, she could also maintain her suit as a third-party beneficiary of Alabama's contractual commitment to DOT to abide by the terms of those regulations. Pet. App. 112a. That assertion is untenable. First, Ms. Sandoval's complaint never asserted such a state-law breach-of-contract cause of action. More importantly, that assertion begs the question of congressional intent; if Congress did not authorize federal agencies to issue disparate impact regulations, there is no reason to believe that it nonetheless authorized federal agencies to enter into contracts demanding

(continued...)

A. Adoption of a Disparate Impact Standard Is Unworkable and Is Inconsistent with the Legislative History of Title VI

The Court repeatedly has recognized that imposing liability on the basis "disparate impact" evidence can be disruptive of a wide-range of long-accepted practices and can even create incentives for entities to secretly engage in invidious discrimination as a means of avoiding disparate impact liability. Adoption of a disparate impact standard under Title VI risks promoting all of those undesirable results. Given the overwhelming evidence -- particularly in the legislative history -- that *intentional* discrimination on the basis of race, color, or national origin was Congress's sole focus in adopting Title VI, there can be no justification for judicial deference to administrative regulations that, by targeting policies thought to have a disparate impact among racial or nationality groups, may encourage federal fund recipients to engage in the very types of intentional discrimination Title VI was designed to prevent.

In *Hernandez v. United States*, Justice O'Connor explained well why concern over the disruptive impact of an disparate impact standard has led the Court to reject use of that standard in its equal protection analysis:

> In *Washington v. Davis*, we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule

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[7](...continued)
that federal fund recipients agree not to maintain policies having a disparate impact on the basis of race, color, or national origin.

> would give rise to an unending stream of constitutional challenges:
>
> "A rule that [state action] designed to serve neutral ends is nonetheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.*, 426 U.S. at 248.

Hernandez v. United States, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment).

Adoption of a disparate impact standard under Title VI regulations is likely to have precisely the disruptive effects warned of in *Washington*. For example, colleges (virtually all of which are federal fund recipients) can expect their admissions processes to be subjected to frontal assault; those processes tend to have a disparate impact on less-affluent racial minorities who lack the academic preparation of more-affluent, nonminority students. Indeed, the U.S. Department of Education recently issued a draft guidance document elaborating on its Title VI regulations. The guidance document is a thinly veiled threat of enforcement action against colleges that fail to decrease their reliance on standardized tests (such as the SAT and the ACT) in the admissions process because those tests have been shown to have a disparate impact on certain racial minority groups. *See* U.S. Dep't of Education, "The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers" (July 6, 2000).

Validation of the disparate impact regulations also would severely test the ability of the business community to obtain necessary environmental permits. For example, the Environmental Protection Agency recently issued its "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits," 65 Fed. Reg. 39,650 (June 27, 2000). This EPA guidance document extends the Title VI disparate impact concept to applications for EPA permits. Under EPA's new view of its Title VI regulations, citizens may file a federal suit to block the grant of an EPA permit to an industrial facility located in their community by demonstrating that other communities, with lesser concentrations of members of the plaintiffs' particular racial group, are host to fewer sources of industrial pollution. Evidence of discriminatory intent would be unnecessary. Indeed, the Title VI case in which the court granted certiorari in 1998 was just such an "environmental justice" suit. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *cert. granted*, 524 U.S. 915, *vacated as moot*, 524 U.S. 974 (1998).[8]

Moreover, the Court has recognized repeatedly that adoption of disparate impact standards may induce entities to engage surreptitiously in intentional discrimination in

[8] Although the Title VI disparate impact regulations have been on the books for decades, only in recent years have there been significant efforts to enforce those regulations apart from the requirements of Title VI itself. The absence of widespread disparate-impact challenges to commonly accepted practices may well reflect uncertainty regarding the validity of the Title VI regulations. But one could expect a sharp uptick in suits to enforce the regulations should the Court affirm the court below.

order to avoid the types of racial or ethnic imbalance that can give rise to disparate impact lawsuits. For example, in *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), the plurality warned against adoption of rules making it more difficult for employers to defend against Title VII disparate impact litigation, because:

> Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution, . . . and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII. . . . If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

Watson, 487 U.S. at 993 (plurality) (citations omitted).[9]

The same danger exists if the Court upholds the Title VI disparate impact regulations. That danger is perhaps best illustrated in the field of higher education. In 1996, in the face of concerns that extensive affirmative action programs adopted by state agencies amounted to intentional discrimination against nonminorities, California voters adopted Proposition 209, which outlawed racially preferential practices in employment, contracting, and

[9] *See also, Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring in the judgment).

education. After those practices were eliminated, minority enrollment declined at a number of prestigious public universities. The U.S. Department of Education responded by opening a massive (and still ongoing) investigation into potential Title VI disparate impact violations by California in its university admissions practices. Patrick Healy, "A Lightning Rod on Civil Rights," *The Chronicle of Higher Education* at A42 (Sept. 17, 1999). The lesson is obvious: federal fund recipients seeking to avoid liability under the Title VI disparate impact regulations should adopt the types of racial preferences rejected as potentially unconstitutional by California voters when they adopted Proposition 209.

There can be little doubt that outlawing *intentional* discrimination on the basis of race, color, or national origin by federal fund recipients -- not neutral policies having a disparate impact -- was Congress's sole focus in adopting Title VI. *See, e.g., Cannon,* 441 U.S. at 704. The legislative history of Title VI is replete with references to the statute's singular focus on intentional discrimination. *See id.* at 711 n.48; 110 Cong. Rec. 6562 (1964) (remarks of Sen. Kuchel in support of Title VI) (a local government agency "ought not to receive [federal aid] if it is dedicated to use it in an unconstitutional manner"); *id.* at 6544 (Sen. Humphrey). Yet, as noted above, validation of the Title VI disparate impact regulations would tend to undermine that singular purpose by providing federal fund recipients with incentives to engage in the very types of racially preferential practices that Title VI was designed to eliminate.

Finally, adopting disparate impact analysis under Title VI would be totally unworkable. In the employment context (where disparate impact analysis applies by virtue of Title VII), Congress has prescribed that an employer may

continue a practice causing disparate impact if it can demonstrate that "the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(I). Determining whether an employer has made those demonstrations can often be very difficult; but at least courts can assume that the employer's ultimate goal is to maximize profits, and job-relatedness and business necessity can be measured based on whether a practice significantly advance profitability.

Title VI cases, on the other hand, arise outside the employment context and thus lack an economic grounding that would allow for objective determinations regarding whether a challenged practice is really "necessary." This case well illustrates the unworkability of disparate impact analysis in the context of Title VI. Alabama adopted its English-only rule in part for the purpose of encouraging use of English by all its residents; promotion of a common language is viewed by backers of "official English" legislation as an effective means of promoting a unifying heritage among Americans and helping to integrate non-English speakers into the broader society and economy. It is impossible to quantify the "necessity" of those goals in our society, and thus impossible for judges to determine objectively whether those goals are really "necessary." The Eleventh Circuit evidently believed that those goals were not sufficiently important to justify the Alabama English-only rule at issue in this case, because it struck down the rule under a disparate impact analysis. Not surprisingly, however, the appeals court's opinion contains absolutely *no* discussion regarding how the court arrived at that conclusion, because there simply is no principled basis for making that decision. The decision ultimately comes down to a judge's philosophical views regarding the importance of

a common language in our pluralistic society. The absence of any objective standards by which judges can determine whether a challenged practice is sustainable provides strong additional grounds for striking down the Title VI disparate impact regulations.

B. Congress Cannot Be Said to Have Ratified the Disparate Impact Regulations

Ms. Sandoval in her opposition brief (and the United States as a supporting *amicus curiae* below) argued that regardless whether Congress in 1964 authorized adoption of Title VI disparate impact regulations, it has long since ratified those regulations through adoption of subsequent legislation. Opp. Br. 21-23; U.S. Eleventh Cir. Br. 34-38. That argument is without merit.

The two statutes upon which Ms. Sandoval and the United States base that argument are the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7; and the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 259. The Rehabilitation Act Amendments purported to abrogate the States' Eleventh Amendment immunity from a variety of civil rights laws, including Title VI. The Civil Rights Restoration Act broadened the coverage of Title VI to include a prohibition against discrimination by *any* portion of a fund recipient's operations, not simply by the fund recipient's specific program that receives federal funds.[10]

[10] The statute was intended to reverse the Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984).

The gist of Ms. Sandoval's and the United States's argument is that Congress must have endorsed the Title VI disparate impact regulations when it expanded the scope of Title VI's coverage in 1986-88, because it was well aware at that time that *Guardians* and *Alexander* had upheld those regulations yet it did not attempt to narrow the potential disparate impact liability of those entities newly covered by Title VI. The fallacy in that argument is that -- as noted above -- *Guardians* and *Alexander* did *not* uphold the Title VI disparate impact regulations. Because the validity of those regulations was still an open question at the time that the two statutes were enacted, no conclusion regarding congressional endorsement can be drawn from Congress's expansion of Title VI's coverage without addressing the disparate impact regulations.[11]

In support of her view that the Restoration Act validated Title VI disparate impact suits by private litigants, Ms. Sandoval cites repeatedly to warnings by *opponents* of the Act that some courts had upheld disparate impact suits by private litigants, thereby "rais[ing] the spectre that broadening the scope of Title VI would spur additional lawsuits against federal funding recipients." Opp. Br. 22. *Amici* respectfully suggest that statements made by opponents of legislation is of little relevance regarding the

[11] During that time frame, the validity of the Title VI disparate impact regulations was an open question not only in this Court but in the federal appellate courts as well. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) ("[W]e need not reach the apparently still unsettled question of whether Title VI requires a showing of intentional discrimination. . . . Nor need we consider the proposition, supported by at least four members of the Court [in *Guardians*], that non-discrimination regulations promulgated under Title VI may be found violated upon a showing only of disparate impact.")

legislation's intended meaning. In any event, opponents would have had every reason to argue as they did regardless whether they believed that there was a *possibility* that courts would uphold the disparate impact regulations and would recognize a private right of action to enforce the regulations, or whether they believed (as suggested by Ms. Sandoval) that courts had already done so.

The Court's discussion of the Rehabilitation Act in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), puts to rest any argument that the Act should be viewed as congressional ratification of the Title VI disparate impact regulations:

> Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions of this legislation.

Franklin, 503 U.S. at 73. Because the Title VI disparate impact regulations could not be said at the time of the Act's enactment in 1988 to constitute an "existing right[] of action" under Title VI -- indeed the validity of those regulations was placed very much up in the air following *Guardians* -- there is no merit to the argument that Congress ratified the regulations when it adopted the Act.

CONCLUSION

Amici curiae respectfully request that the Court reverse the judgment below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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